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10 Attorneys for Defendants

12 **UNITED STATES DISTRICT COURT**
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
14 **LOS ANGELES**

15 CH₂O, Inc.

16 Plaintiff,

17 v.

18 MERAS ENGINEERING, INC.;
19 HOUWELING'S NURSERIES
20 OXNARD, INC; HNL HOLDINGS
21 LTD.; HOUWELING UTAH
22 OPERATIONS, INC.; AND
23 HOUWELING'S NURSERIES LTD.,

Defendants.

CASE NO. CV 13-08418-JAK-GJSx

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION IN
LIMINE NO. 8 TO EXCLUDE
IMPROPER EXPERT
TESTIMONY**

JUDGE JOHN A. KRONSTADT
Trial Date: May 31, 2016

1 Defendants hereby oppose Plaintiff's motion *in limine* No. 8, to exclude allegedly
2 improper expert testimony. Plaintiff's motion seeks to exclude two broad
3 categories of testimony: expert testimony not disclosed in the experts' reports; and
4 testimony premised on an allegedly wrong standard.

5 **1. Expert Testimony Not Disclosed in the Experts' Report**

6 With respect to this issue, Plaintiff apparently seeks only to have the relevant
7 provisions of Rule 26 enforced. In this regard, Defendants have no objection,
8 provided, of course, the rule is applied even-handedly for all expert witnesses. By
9 way of example, Plaintiff cites to the report of Dr. Siegel (Defendants' damages
10 expert) and notes that it provided no opinion as to lost profits. In this regard,
11 Defendants have no intention of eliciting testimony from Dr. Siegel with respect to
12 lost profits, unless Plaintiff "opens the door" to such testimony by asking him
13 questions on the subject.

14 For the same reasons, and as set out with particularity in Defendants' motion
15 for summary judgment and in their motions in limine, Plaintiff's technical expert
16 (Dr. Hermanowicz) must be prohibited from testifying or offering an opinion that
17 the averages and combinations of data points underlying Plaintiff's In-House
18 Testing accurately simulated the actual conditions at Houweling's. As Defendants
19 detailed in the summary judgment briefing and oral argument, the only testimony
20 on this point was the impermissible lay opinion of Plaintiff's President, Anthony
21 McNamara. Dr. Hermanowicz's report was silent on the issue. Under Plaintiff's
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1 logic and application of Rule 26, any attempt by Dr. Hermanowicz to sanitize, after
2 the fact, Mr. McNamara's choices, will be impermissible.
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4 **2. Testimony Premised on an Allegedly Wrong Standard.**

5 With respect to this argument, Plaintiff is attempting to require Defendants'
6 technical expert, Dr. Bubnis, to be conversant in the intricacies of the patent law.
7 In essence, Dr. Bubnis testified that he did not think the '470 patent is valid
8 because, among other reasons, he has seen no evidence that sodium molybdate acts
9 as a catalyst. They take issue with the fact that, in his explanation of this issue
10 during his deposition, he did not mechanically and repeatedly recite that the patent
11 must be presumed valid and that it takes clear and convincing evidence to rebut
12 this presumption.
13

14 But this is not the job of a technical expert and his failure to so recite does
15 not impact on the admissibility or scope of his testimony. The job of a technical
16 expert is to provide testimony that will assist the jury in determining if the patent is
17 valid or infringed. The Court will provide the jury with the appropriate legal
18 standards. Cherry picking a few lines of testimony from the transcript of a
19 deposition that lasted all day, and ignoring the more detailed explanation in his
20 expert report does not lead to the conclusion that he should not be permitted to
21 testify, nor can it limit the scope of his testimony. Notably, Plaintiff did not
22 provide the Court with a copy of Dr. Bubnis's report from which the Court could
23 determine if he used the wrong standards as Plaintiff now alleges. To the extent
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1 Defendants believe Dr. Bubnis used the wrong testimony or that he will change his
2 testimony at trial, these issues go to the weight of his testimony, to be determined
3 by the jury after Plaintiff has the opportunity to cross-examine Dr. Bubnis. Dr.
4 Bubnis is prepared to offer his opinion, as an expert in the field with decades of
5 experience, that sodium molybdate does not catalyze the chlorine dioxide reaction.
6 With this opinion and the Court's legal instruction, Dr. Bubnis's testimony will be
7 relevant and will not be prejudicial in any way.

8 Plaintiff's argument in this regard reveals a very fundamental difference
9 between how the parties prepared and used their respective experts. For example,
10 the report of Dr. Hermanowicz (Plaintiff's technical expert) is filled with pages and
11 pages of his "understanding" of various legal principles and standards. These
12 sections were obviously and admittedly written by counsel. Dr. Bubnis's report
13 contained no such recitations. This difference does not render Dr. Hermanowicz's
14 testimony admissible or Dr. Bubnis's inadmissible.

15 Moreover, Plaintiff offers no supporting case law or analysis regarding
16 admissibility on these grounds. Rather, Plaintiff cites only to case law regarding
17 the general legal standards for validity. In essence, however, Plaintiff is making a
18 *Daubert* motion to exclude an expert's testimony without bothering to engage in a
19 *Daubert* analysis.

1 Respectfully Submitted,

2 Dated: Scarsdale, NY
3 May 9, 2016

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10 **CERTIFICATE OF SERVICE**

11 I hereby certify that a true and accurate copy of the foregoing document
12 was served on Plaintiff on May 9, 2016 via CDCA ECF system, addressed to
13 counsel for Plaintiff as follows:

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24 Dated: Scarsdale, New York
25 May 9, 2016

26 /s/ Eric A. Menist
Eric A. Menist